No. 12442

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN I. HAAS, INC., a Corporation,

Appellant,

v.

O. L. WELLMAN,

Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

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SUBJECT INDEX

TABLE OF CASES

STATUTES CITED

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STATEMENT OF CASE

It is said in the plaintiff's brief, page 9, that Mr. Noakes told the plaintiff that he thought the yard should be picked. The record does not support that statement. The plaintiff testified that Mr. Noakes told him that there were so many good hops that he, Mr. Noakes, would not leave them, that is, fail to pick them (Tr. 407). Mr.

Noakes testified that he told the plaintiff that if they were his hops he would harvest at least some of them (Tr. 278).

While it is true, as asserted in the plaintiff's brief, page 10, that some hops of other growers were accepted by the defendant which had a leaf and stem content of 11% or more, there is no evidence that any of such hops were affected by mildew in any substantial degree. The defendant rejected the plaintiff's hops for two reasons: They were substantially and seriously damaged by mildew, and they were not cleanly picked. The character of the pick was the less important of these two reasons. Because of the mildew damage, the hops would not have been of prime quality even if the leaf and stem content had been 8% or less.

The defendant vigorously denies that it accepted the hops and denies that the weighing of them constituted an acceptance. This will be considered in detail in the argument.

The price was not paid when the hops were weighed on September 25, 1947, because the hops were not then accepted. The price was not paid at any other time because they were never accepted, but, on the contrary, were rejected by the defendant. Payment did not become due when the official leaf and stem analysis was received, nor at any other time.

The statement that the defendant instructed its Oregon agent to reject the plaintiff's cluster hops, assigning as a reason that "the restrictions on brewers in the use of grain has changed the picture considerably" (Ex. 3-U, Tr. 53, 55), is misleading in that counsel for the plaintiff

simply took one comment from its context and failed to mention the real reasons for the rejection appearing in that letter and others: the extensive mildew damage and the dirty pick. In the defendant's letter of October 30, 1947, to the Ray firm, this statement was made, "Wellman, sample No. 51: We confirm our instructions to reject these hops. They are extremely poor and the picking is certainly dirtier than the 11% indicated on the official analysis" (Ex. 3-W, Tr. 53, 55). Exhibit 3-U, just referred to, declares that the leaf and stem content was actually 19% (Tr. 53, 55).

The character of the negotiations between the plaintiff and the Ray firm, referred to in the plaintiff's brief, page 16, must be clarified. These negotiations, if the conduct of the parties may be so described, consisted simply in Mr. Ray attempting to find another buyer for the plaintiff's hops, and conversations with respect thereto, including suggestions by Mr. Ray to the plaintiff that the plaintiff should attempt to find another buyer himself. These "negotiations" had nothing whatever to do with whether or not the defendant or the Ray firm would or intended to buy or pay for the plaintiff's hops. The plaintiff understood in October 1947 that the defendant had not accepted and had no intention of accepting or paying for such hops. In his complaint the plaintiff alleged (Tr. 4): "defendant advised plaintiff in October 1947 that it did not wish to take said hops; and at that time and from time thereafter defendant suggested that plaintiff try to find some other buyer for said hops."

Reference is made by the plaintiff, page 16, to the fact

that S. S. Steiner, Inc., which contracted to buy the other one-half of the plaintiff's 1947 hops, after rejecting the plaintiff's cluster hops, settled with the plaintiff. Such compromise is clearly not binding on the defendant. Furthermore, the testimony of Mr. Eismann, the Steiner representative, establishes that there is a very clear reason why S. S. Steiner, Inc. might have been held liable to Mr. Wellman. The Steiner employee who weighed the plaintiff's hops at the warehouse gave to the plaintiff afterwards a weight slip setting forth the quantity of hops weighed and bearing the notation "Hops Received" (Tr. 382). This was not intended by the Steiner employee as an acceptance and it was delivered to Mr. Wellman without authority (Tr. 383, 384). No weight slip of any kind was given by the Ray firm to the plaintiff following the weighing of his hops. This is an extremely important fact which will be considered in the argument of the question whether the weighing of the hops by the Ray firm constituted an acceptance.

We desire here to correct an error which appears in the Statement of Case in our original brief, pages 18 and 19. It is there said that Mr. Ray testified that he told the plaintiff that he, Mr. Ray, thought that "the defendant had a moral, but not a legal, obligation to pay for the hops." That is incorrect. Mr. Ray actually testified that he told the plaintiff that he thought the defendant had a moral, but not a legal, obligation to find a home for these hops that had been rejected, that is, a buyer for them (Tr. 209, 210).

ARGUMENT

IV

The sub-heading in the defendant's original brief will be used again with such changes as are necessary.

1. The finding that it was an established usage and custom in the hop trade in Oregon that the weighing in of hops by the buyer following an inspection constituted an acceptance of such hops.

The defendant contends that the supposed custom should not be given effect for these reasons:

(a) The evidence is insufficient to establish that such custom or usage existed in Oregon.

We desire to emphasize at the outset that the plaintiff relies entirely upon the single act of weighing his hops, to establish an acceptance of them by the defendant. There is not one word in the transcript from which it can be inferred that the defendant actually agreed to take the hops. The plaintiff did not testify that anyone representing the defendant agreed to accept them.

We acknowledge that we failed to consider the testimony of Mr. Geschwill in his own case, in preparing the defendant's brief in the present case.

The defendant still contends vigorously, however, that the evidence is insufficient to meet the requirements of the law of Oregon.

The gist of the testimony of the witnesses on this subject is as follows:

Mr. Wellman: His testimony should be entirely disregarded as he simply stated that the only way he ever sold hops was that "weighing in" was considered to be an acceptance. He gave no testimony whatever with respect to any custom (Tr. 83).

Mr. Kever: This witness stated that weighing in is an acceptance, and he defined the term "weighing in" to mean the weighing of the hops plus the giving of the weight slip by the buyer to the grower (Tr. 134, 138, 140, 143).

Mr. Glatt: This witness testified that "weighing in" was considered to be an acceptance provided that there was an agreement that the hops weighed would be accepted at a certain price, and the tryings met the type samples. He stated that whether or not hops have been accepted is really a matter of intention and agreement of the two parties. (Tr. 126, 427, 428).

Mr. Geschwill: He said that there was an acceptance when the hops went over the scale and there was nothing wrong with them (Geschwill Tr. 116).

It is clear, therefore, that there is no uniformity in this testimony whatever. Not one of the last three witnesses mentioned supports either of the others. Each has a different version of the supposed custom. Nor can any one of the three versions be supported by the indefinite references of the defendant's witnesses.

The proof is therefore fatally defective in two respects:

(1) No custom is established by the testimony of two witnesses, as required by Sec. 2-902 O.C.L.A.

(2) The supposed custom is not uniform as required by *Port Investment Co. v. Oregon Mutual Fire Insurance Co.*, 163 Or. 1, 94 Pac. 2d 734.

The plaintiff now contends that the "weighing" of the hops constituted the acceptance. The finding on which

that contention is based, however, declares that the custom was that the "weighing in" of the hops constituted an acceptance (Tr. 12).

There is no finding that "weighing" the hops amounted to an acceptance. The finding is explicit that it was the "weighing in" which constituted the acceptance.

Counsel for the plaintiff and the witnesses who testified for one or more of the plaintiffs were careful to avoid the word "weighing" and to use only the expression "weighing in," apparently for the reason that the latter expression carries the connotation of "acceptance," whereas the simple word "weighing" does not.

In any event, the only finding in this case is that it was the "weighing in" which constituted the acceptance. It therefore becomes important to determine what the witnesses meant by the term "weighing in." The only witness who actually defined the term was Mr. Kever, who testified as follows (Tr. 140):

> "Q. What constitutes actual weighing in? What is done in connection with weighing in hops?
>
> A. Well, weigh them and mark it on a slip, and the grower gets a slip and the buyer keeps a slip with the weight on."

It is clear, therefore, that this finding means that it is the weighing of the hops by the buyer plus the giving of a "slip with the weight on," that is, a receipt or acknowledgment, which constitutes the acceptance.

No receipt, acknowledgment or weight slip of any kind was delivered to the plaintiff when his hops were weighed on September 25, 1947, or at any other time material to this case.

Exhibit 2 (Tr. 53), the weight slip prepared by Mr. Noakes when the hops were weighed, came into the hands of the plaintiff's counsel after this action was started. It was taken from the defendant's files, which is fully confirmed by the fact that it bears on its face, in red pencil, the word "Rejected." Mr. Noakes testified that he sent it to the Hillsboro office of the Ray firm (Tr. 290). This is confirmed by the testimony of Mrs. Townsend, the office manager of the Ray firm (Tr. 264, 265). There is no evidence that the plaintiff was ever given a copy or duplicate of it.

The testimony of Mr. Geschwill adds nothing to Mr. Wellman's case. If Mr. Geschwill's testimony can be construed to mean that "weighing in" consisted merely of weighing, which is denied, it is still insufficient to establish that weighing alone constituted a "weighing in," for these reasons:

(1) The custom is not uniform, as Mr. Kever testified that a receipt or weight slip must be given at the time of the weighing, to bring about a "weighing in."

(2) The custom expressed by Mr. Geschwill is not established by the testimony of two witnesses, as no one corroborated him on this point.

It is therefore clear that the custom expressed in the first sentence of Paragraph 8 of the Findings of Fact may not be applied and that the plaintiff may not now rely upon some other custom not supported by the findings or the evidence.

(b) The custom or usage set forth in the finding can-

not be given effect and has no application to this case for the reason that the contract is not ambiguous and there is no need nor occasion for interpreting it.

Section 2-228 (12), O.C.L.A., contains this provision:

> "* * * usage is never admissible except as a means of interpretation; * * *."

The contract declares that the defendant will pay the balance due on the purchase price "upon delivery and acceptance of said hops" (Exhibit 1-A, Tr. 53). In other words, the defendant became liable only upon delivery of the hops and the acceptance of them by the defendant.

It cannot possibly be said that there is any ambiguity in the word "acceptance" as used by these parties, as it must be construed to have the same meaning as that given to it by the Uniform Sales Act, in the absence of evidence that the parties intended the word to have some other meaning. There is no evidence that such was the fact.

Section 48 of the Act, Section 71-148, O.C.L.A., declares:

> "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, * * *."

In *Vacuum Ash & Soot Conveyor Co. v. Huylers,* 101 N.J.L. 147, 127 Atl. 203, the court said that to constitute an acceptance of goods, there must be "some unequivocal act with intent to take possession of the goods as owner."

Nor is there any ambiguity in the word "acceptance" when it is given its plain and ordinary meaning. In the defendant's brief, page 64, it is shown that the word

"accept" means "to receive with a consenting mind," that is, "to come into possession of, get, acquire, or the like" with a consenting mind.

It is clear, therefore, that there is no possible ambiguity in the word "acceptance," whether it is given the statutory definition or that found in the standard dictionaries. It follows that the supposed custom relied upon by the plaintiff cannot be given effect.

There was no acceptance in this case, within the meaning of either of these definitions.

The defendant certainly did not intimate to the plaintiff by word or act that it accepted them. The plaintiff does not rely upon any evidence that there was such an intimation. His sole contention is that in a complete vacuum, devoid of any words, the defendant weighed his hops. He did not intimate in any way that the defendant agreed to accept them.

Nor can it be said that the defendant received the hops with a consenting mind. The defendant did not "receive" them nor did it have a consenting mind.

2. The finding that the defendant accepted the plaintiff's hops.

The entire record, in fact every circumstance, indicates that there was no acceptance. The many circumstances which support this conclusion are set forth in the Statement of Case in the defendant's brief, pages 16 to 20.

One fact, particularly, should be emphasized: In his complaint the plaintiff alleges that when the defendant advised the plaintiff that it did not wish to take his hops,

in October 1947 (October 28), "defendant suggested that plaintiff try to find some other buyer for said hops" (Tr. 4).

This allegation is a clear confirmation that there was no acceptance and that the plaintiff was fully aware that such was the fact, in October 1947.

V

The plaintiff's only answer to the argument under this heading is that the defendant did not specify any particular objection it may have had to the hops when they were tendered to the defendant at the warehouse or when the defendant notified the plaintiff that it did not wish to take such hops.

The plaintiff, in quoting the testimony of Mr. Noakes, page 33, omitted from his quotation the most significant part of it, as follows (Tr. 321):

> "Going back a year and a half, it is pretty hard to remember just exactly what you said, but I am sure Mr. Wellman understood they were not taking his hops, because we talked about it, and it definitely was understood that the quality was such that they would not accept them. I know that."

The plaintiff's reference to this incident was that nothing was said about a rejection (Tr. 85, 91, 109). It is true that Mr. Noakes did not testify that he told the plaintiff that the defendant "rejected" his hops. As pointed out, however, in the defendant's brief, pages 62 to 66, Mr. Noakes did tell the plaintiff that the defendant could not and did not accept his hops. The authorities

discussed in that portion of the argument establish that the use of the word "reject" was not necessary to bring about an actual rejection.

Furthermore, the plaintiff is in no position to contend that his hops were never rejected or that he did not know they were rejected. In his own complaint (Tr. 4), he admitted that the defendant suggested that he try to find some other buyer for his hops. There could have been no possible reason for such a suggestion by the defendant unless the defendant had already rejected the plaintiff's hops.

The defendant respectfully contends, therefore, that the evidence is such as to create a definite and firm conviction that a mistake has been made by the trial court in the finding that the defendant did not specify any particular objection it may have had to said hops, and that this finding should therefore be set aside. In support of that contention the defendant relies upon the authorities set forth in the original Geschwill brief, pages 39 and 40.

If, however, this finding is sustained, the defendant contends that the Oregon tender statute, Section 72-103, O.C.L.A., referred to in the plaintiff's brief, page 32, has no application for the reason that it was repealed by the Uniform Sales Act.

Section 79 of the Act, Section 71-179, O.C.L.A., provides:

> "All acts or parts of acts inconsistent with this act are hereby repealed, * * *."

The defendant contends that the Oregon tender stat-

ute, enacted in 1862 and never amended, is inconsistent with Section 19, Rule 4 (1) of the Uniform Sales Act, Section 71-119, Rule 4 (1), O.C.L.A., and was therefore repealed.

Section 72-103, O.C.L.A., declares:

> "The person to whom tender is made shall at the time specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; * * *."

Section 19, Rule 4 (1) of the Act, enacted in 1919, provides:

> "Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer upon the assent of the seller, the property in the goods thereupon passes to the buyer. * * *"

By reason of Section 19, Rule 4 (1) of the Act, title to property passes when there is an appropriation with assent. It cannot be said to pass when there is appropriation without assent. The expression of non-assent, that is, of rejection, is therefore sufficient to prevent the passing of title, whether any reason is given for the rejection or not. To the extent that the Oregon tender statute required something in addition to a rejection or expression of non-assent, it was inconsistent with Section 19, Rule 4 (1) of the Act and was repealed.

VI to IX

Inasmuch as the appellee has adopted by reference its argument applicable to these headings in the Geschwill case (Br. 37), we incorporate by this reference the material in the reply brief in the Geschwill case, pages 13 to 20.

Respectfully submitted,

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